

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-1668

ZULAY RENDON, individually and as parent
and natural guardian of Garcia, a minor,

Appellant

v.

PHILADELPHIA HEALTH SERVICES; EPISCOPAL HOSPITAL;
DR. HARSHAD; K. PATEL; LEHIGH AVENUE RADIOLOGY ASSOCIATES, INC.;
UNITED STATES OF AMERICA

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 99-cv-05912)
District Judge: Honorable Edmund V. Ludwig

Argued May 23, 2002

BEFORE: MCKEE, STAPLETON and WALLACE,* Circuit Judges

(Opinion filed June 24, 2002)

* Honorable J. Clifford Wallace, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Joan E. London
Kozloff Stoudt
2640 Westview Drive
P. O. Box 6286
Wyomissing, PA 19610

John E. Muir (Argued)
Roland & Schlegel
627 North Fourth Street
P. O. Box 902
Reading, PA 19603-0902

Attorneys for Appellant

Michael L. Levy
United States Attorney

James G. Sheehan
Asst. United States Attorney

Chief, Civil Division

Annetta F. Givhan (Argued)
Asst. United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-1250

Attorneys for Appellee
United States of America

Nancy K. Raynor
O'Brien & Ryan
Suite 300 Hickory Pointe
Plymouth Meeting, PA 19462

Attorney for Appellee
Episcopal Hospital
Kent & McBride
18th & Arch Streets
Two Logan Square, Suite 600
Philadelphia, PA 19103

James L. Moore, Jr.

Attorney for Appellees
K. Patel and
Lehigh Avenue Radiology Associates, Inc.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

When the District Court granted summary judgment to the defendants in this medical malpractice case brought under the Federal Tort Claims Act, it did not have the benefit of our decision in *Hughes v. United States*, 263 F.3d 272 (3d Cir. 2001). That FTCA case, like this one, involved a malpractice claim based on allegations that the defendants caused the plaintiff's injuries by negligently failing to diagnose and/or treat a condition that needed medical attention.

We held for the first time in *Hughes* that "the FTCA's statute of limitations is not jurisdictional" and that "[f]ailure to comply with the statute is an affirmative defense which the defendant has the burden of establishing." *Id.* at 278. The District Court in this case understandably treated the limitations issue as a jurisdictional one with the burden of proof on the plaintiff, and this approach may well have influenced its ultimate conclusions. Moreover, *Hughes* also provides new guidance on the application of the Supreme Court's decision in *United States v. Kubrick*, 444 U.S. 111 (1979) to a situation in which the alleged malpractice is a failure to diagnose and/or treat. *Id.* at 276-78.

We will vacate the judgment of the District Court and remand to provide an opportunity for the District Court to consider the issues here raised in light of the development of the relevant law in *Hughes*, 263 F.3d 272 (3d Cir. 2001). _____

TO THE CLERK:

Please file the foregoing Not Precedential opinion.

/s/Walter K. Stapleton

Circuit Judg